

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MIKE KREIDLER,

Plaintiff,

v.

DANNY L. PIXLER, *et al.*,

Defendants.

Case No. C06-0697RSL

ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO DISMISS; GRANTING
LEAVE TO AMEND

I. INTRODUCTION

This matter comes before the Court on a motion to dismiss filed by several, but not all, of the defendants (Dkt. #21). Anthony Huff, Sheri Huff, Roxann Pixler, and Midwest Merger Management, LLC (collectively, the “moving defendants”) move to dismiss based on lack of personal jurisdiction.¹ Alternatively, they seek (1) dismissal of all claims against them based on Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief may be granted, and (2) dismissal of the fraud, civil conspiracy, Consumer Protection

¹ Defendants do not contest the Court’s exercise of personal jurisdiction over defendants Danny Pixler, who is married to Roxann Pixler, and Certified Services, Inc. (“Certified”). This matter has been automatically stayed as to Certified due to its filing in the U.S. Bankruptcy Court for the Southern District of Florida.

1 Act, and Criminal Profiteering Act claims based on Fed. R. Civ. P. 9(b). At the request
2 of the parties, the Court heard oral argument in this matter on November 20, 2006.

3 For the reasons set forth below, the Court grants the motion in part and denies it in
4 part, and grants plaintiff permission to file an amended complaint.

5 II. DISCUSSION

6 A. Background Facts.

7 Plaintiff Mike Kreidler is the Insurance Commissioner for the State of
8 Washington. Plaintiff is the owner of all causes of action of Cascade National Insurance
9 Company ("Cascade"), which has been placed into receivership for liquidation pursuant
10 to the state insurance code. Plaintiff brings this action in his official capacity as the
11 receiver of Cascade.

12 Cascade was a domestic stock insurer engaged in providing insurance for private
13 passenger automobile and commercial trucking and for workers' compensation. Cascade
14 began experiencing financial difficulties, and its owner, Legend Holdings, Inc., sought a
15 purchaser or investor for the company. In the fall of 2003, defendant Danny Pixler
16 ("Pixler") began discussions to purchase Cascade.

17 Pixler is a longtime friend, business partner, and brother-in-law of defendant
18 Anthony Huff. Mr. Huff was married to Sheri Huff; they are now divorced.

19 As alleged in the complaint, Pixler "was engaged in a business enterprise" called,
20 among other names, The Cura Group ("Cura"). Complaint at ¶ 3.4. Cura served as a
21 professional employer organization ("PEO"). A PEO, also referred to as a labor
22 contractor, provides human resources services to its clients, typically small and medium
23 sized businesses, including payroll and benefits administration, health and workers'
24 compensation insurance programs, and other similar services directly to the employer's

1 workforce. The workforce employees become employed by the PEO, and are then leased
2 or contracted to the PEO's clients. Pixler needed a workers' compensation insurer
3 licensed in California, as Cascade was, to provide insurance for his PEO operations.

4 The purchase of Cascade involved a complicated series of transactions involving
5 several entities. In November 2003, Legend Holdings executed documents, including a
6 Term Sheet; Pixler also executed the Term Sheet using his power of attorney for Eugene
7 Weiss (the "Buyer"). The Term Sheet provided for a transfer of 9.9% of the ownership in
8 Cascade, immediate deposit by the Buyer of \$1 million to be held on account in the name
9 of Midwest Merger Management ("Midwest"), regulatory approvals, an option for the
10 Buyer to acquire an additional 90.1% interest in Cascade, and payments by the Buyer on
11 an outstanding bank loan. During the relevant time, Midwest was a Kentucky LLC which
12 was owned 50% by Sheri Huff, 49% by Roxann Pixler, and 1% by Michele Brown, Mr.
13 Huff's secretary. The Term Sheet also provided that the parties would enter into an
14 agreement for Cascade to provide workers' compensation insurance on behalf of the
15 Buyer "and/or his assigns (The Cura Group, Inc.)." Complaint at ¶ 3.8.

16 The parties executed a second agreement regarding the purchase of Cascade. In
17 December 2003, Legend Holdings entered into a Stock Purchase Agreement (the
18 "Agreement") with Gudeman & Weiss ("G&W"), an entity formed at the direction of
19 Pixler to acquire insurers to provide workers' compensation insurance to the PEOs.
20 Pixler owned 90% of G&W during the relevant time; the remainder was owned by
21 Edward Gudeman and Eugene Weiss. Pursuant to the Agreement, Gudeman & Weiss
22 purchased a 9.9% interest in Legend Holdings, with an option to purchase the remaining
23 90.1% interest. G&W received the funds for the purchase from Midwest. Among other
24 funding mechanisms, the Agreement provided that \$1 million would be transferred to an
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1 account held in a fiduciary capacity by the bank in the name of Midwest, with “signatory
2 authority residing only in [Pixler].” Complaint at ¶ 3.10. The Agreement provided that
3 after closing, the parties would enter into an agreement whereby Cascade would provide
4 workers’ compensation insurance to the buyer’s clients.

5 Pixler represented that Certified, the successor entity of Cura, would provide the
6 human resources services to the PEO’s clients and provide the financial support to
7 Cascade. Midwest owned approximately 70% of Certified. Certified was to prepare the
8 workers’ compensation policies to be executed and distributed by Cascade. Pixler
9 formed a local California PEO, American Staff Resources of California, Inc. (“ASRC”),
10 to provide the services offered and performed by Certified to their business clients in
11 California. ASRC would be the named insured on the workers’ compensation policies.

12 In February 2004, Cascade issued a workers’ compensation master policy in
13 California through ASRC. Cascade and Pixler entered into two workers’ compensation
14 agreements. The first was signed in August 2004 and the second was signed in October
15 2004. Midwest made the reimbursements and payments, including the payments that
16 were due from ASRC, to Cascade pursuant to the workers’ compensation contracts.

17 Washington law requires that the Washington Insurance Commissioner (“OIC”) approve the acquisition of 10% or more of direct or indirect ownership of an insurance
18 company. Because the transaction initially involved a 9.9% purchase, only an advisory
19 filing was required. After the OIC obtained more information, it informed the Huffs, the
20 Pixlers, and Midwest that the completion of a “Form A” was required. Declaration of
21 James Tompkins, (Dkt. #35) (“Tompkins Decl.”) at ¶¶ 4, 5, 6, 8. The OIC did not
22 approve the transaction. Id. at ¶ 9.

23
24 Plaintiff alleges that ASRC, Pixler, and Certified failed to comply with the
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1 payment terms in the workers' compensation contract. Cascade demanded payment by
2 letter in September 2004. Cascade sent three additional demand letters in November
3 2004 but did not receive payments.

4 Cascade was placed in receivership proceedings on November 30, 2004. The
5 receiver made written demands for payment in December 2004 and August 2005 to
6 Pixler, ASRC and Certified. The demand included a total amount in excess of \$15
7 million, including the security obligation deficiency and fully earned deductible
8 premiums. Plaintiff alleges that Cascade is liable for losses under the workers'
9 compensation policies, even though defendants failed to remit premiums.

10 Plaintiff filed his complaint in King County Superior Court on April 18, 2006;
11 defendants promptly removed the case to this Court based on diversity. Plaintiff alleges
12 the following claims: (1) breach of contract/breach of covenant of good faith and fair
13 dealing against ASRC, Certified, and Pixler; (2) negligent misrepresentation against
14 Pixler, Huff, and Certified; (3) fraud against Pixler, Huff, and Certified; (4) constructive
15 trust against the Pixlers, the Huffs, Certified, and Midwest; (5) unjust enrichment against
16 the Pixlers, the Huffs, Midwest, and Certified; (6) breach of fiduciary duty against Pixler,
17 Huff, and Certified; (7) civil conspiracy against the Pixlers, the Huffs, Midwest, and
18 Certified; (8) violations of Washington's Consumer Protection Act ("CPA") against all
19 defendants; and (9) violations of Washington's Criminal Profiteering Act against all
20 defendants.

21 **B. Personal Jurisdiction.**

22 **1. Relevant Standards.**

23 The plaintiff bears the burden of establishing personal jurisdiction. See, e.g.,
24 Ziegler v. Indian River County, 64 F.3d 470, 473 (9th Cir. 1995) (citing Farms Ins.

1 Exchange v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 912 (9th Cir. 1990)). A
2 plaintiff need only make a prima facie showing of jurisdictional facts through materials
3 submitted in opposition to a defendant's motion to dismiss. See, e.g., Ballard v. Savage,
4 65 F.3d 1495, 1498 (9th Cir. 1995); Ziegler, 64 F.3d at 473.

5 The exercise of jurisdiction must comport with the state's long arm statute, and
6 with the constitutional requirement of due process. See Omeluk v. Langsten Slip &
7 Batbyggeri, 52 F.3d 267, 269 (9th Cir. 1995) (internal citation omitted). "Because the
8 Washington long arm statute reaches as far as the Due Process Clause, all we need to
9 analyze is whether the exercise of jurisdiction would comply with due process." Id.
10 (internal citations omitted). For a forum state to have personal jurisdiction over an out-
11 of-state defendant, that defendant must "have certain minimum contacts with the forum
12 state, such that the maintenance of the suit does not offend 'traditional notions of fair
13 play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316
14 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The due process
15 requirements ensure that individuals have "fair warning that a particular activity may
16 subject [them] to jurisdiction of a foreign sovereign." Shaffer v. Heitner, 433 U.S. 186,
17 218 (1977).

18 Where, as in this case, general jurisdiction is lacking, a court may nevertheless
19 exercise "limited" or "specific" personal jurisdiction depending upon "the nature and
20 quality of the defendant's contacts in relation to the cause of action." Data Disc, Inc. v.
21 Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977). The Ninth Circuit utilizes
22 a three-part test for determining whether due process allows for the exercise of specific
23 jurisdiction: "(1) the nonresident defendant must have purposefully availed himself of the
24 privilege of conducting activities in the forum by some affirmative act or conduct; (2)

1 plaintiff's claim must arise out of or result from the defendant's forum-related activities;
2 and (3) exercise of jurisdiction must be reasonable." Roth v. Garcia Marquez, 942 F.2d
3 617, 620-21 (9th Cir. 1991) (emphasis removed).

4 The purposeful availment inquiry requires an evaluation of whether the
5 "defendant's conduct and connection with the forum State are such that he should
6 reasonably anticipate being haled into court there." Core-Vent Corp. v. Nobel Indus. AB,
7 11 F.3d 1482, 1485 (9th Cir. 1993). This element may be met if "the defendant has taken
8 deliberate action within the forum state or if he has created continuing obligations to
9 forum residents. . . . It is not required that a defendant be physically present within, or
10 have physical contact with, the forum, provided that his efforts are purposefully directed
11 toward forum residents." Ballard, 65 F.3d at 1498 (internal citations omitted); see also
12 Davis v. Metro Prods., Inc., 885 F.2d 515, 520 (9th Cir. 1989) (explaining that the first
13 prong is met if defendants "purposefully directed their activities toward or consummated
14 some transaction with the forum or residents thereof").

15 The second element of the specific jurisdiction test requires the plaintiff's claim to
16 arise out of or result from the defendant's forum-related activities. Garcia Marquez, 942
17 F.2d at 620-21. Once a plaintiff has satisfied the first two prongs on the test, the burden
18 shifts to the defendant to present a "compelling case" that the exercise of jurisdiction is
19 unreasonable. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir.
20 2002); see also Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th
21 Cir. 2000) (explaining that defendant bears the burden of showing that the exercise of
22 personal jurisdiction would be unreasonable) (citing Burger King Corp. v. Rudzewicz,
23 471 U.S. 462, 476-77 (1985)). Courts consider seven factors when determining whether
24 the exercise of jurisdiction comports with traditional notions of fair play and substantial
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1 justice, and is therefore reasonable: “(1) the extent of a defendant’s purposeful
2 interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of
3 conflict with the sovereignty of the defendant’s state; (4) the forum state’s interest in
4 adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6)
5 the importance of the forum to the plaintiff’s interest in convenient and effective relief;
6 and (7) the existence of an alternative forum.” RIO Props., Inc. v. RIO Int’l Interlink,
7 284 F.3d 1007, 1021 (9th Cir. 2002).

8 As an initial matter, plaintiff premises some of his arguments on the actions of all
9 defendants, arguing that since they acted in concert, they are all responsible for the
10 actions with this forum. However, “[e]ach defendant’s contacts with the forum State
11 must be assessed individually.” Calder v. Jones, 465 U.S. 783, 790 (1984).

12 **2. Midwest Management, LLC.**

13 Defendants argue that Midwest “is not licensed to do business, and does no
14 business, in Washington; it does not own any property in Washington; it does not have a
15 registered agent for service of process in Washington; and it does not advertise, solicit
16 business, or direct any of its business activities to Washington residents.” Defendants’
17 Motion at p. 13. Despite those sweeping assertions, Midwest purposefully directed its
18 activities toward Washington and conducted business with Cascade, a Washington
19 resident. Midwest was responsible for and did remit some premium payments to Cascade
20 in Washington pursuant to the workers’ compensation coverage contract. Even though
21 Midwest did not sign the relevant agreements, it had an ongoing obligation to Cascade to
22 remit the payments. Midwest also deposited earnest money with a Washington bank to
23 induce Cascade’s owners into executing the Agreement. In addition, plaintiff alleged that
24 Midwest collected premium payments from clients and retained them, defrauding
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1 Cascade out of payments to which it was contractually entitled. Midwest could
2 reasonably anticipate being haled into court in Washington for failing to meet its funding
3 obligations to Cascade. These contacts are sufficient to satisfy the purposeful availment
4 prong of the test. Plaintiff's claims arise out of Midwest's funding obligations and its
5 cessation of payments.

6 The Court also considers the reasonableness of exercising personal jurisdiction
7 over Midwest. As for the extent of Midwest's interjection into the forum, in addition to
8 the factors above, there is also some evidence that Midwest, Mr. Huff, and Mr. Pixler
9 used various transactions to acquire ownership of Cascade, which they knew was a
10 Washington company. Midwest was created by Mr. Huff, Mr. Pixler, and their attorney
11 to purchase other companies. R. Pixler Dep. at p. 38. Mr. Pixler, with his power of
12 attorney for Eugene Weiss, purchased 9.9% of Cascade. G&W, mostly owned by Mr.
13 Pixler, used money from Midwest to purchase 9.9% and an option to purchase the
14 remainder of Legend Holdings, who owned the other 90.1% of Cascade. Indeed, the OIC
15 became concerned by August 2004 that Midwest, Certified, Mr. Pixler, and Mr. Huff
16 were in a position of control over Cascade.² Tompkins Decl. at ¶ 4. The OIC noted that
17 pursuant to the Agreement, Midwest was required to give consent before G&W could use
18 Midwest's loan proceeds to complete the stock purchase of Cascade or meet its other
19 financial obligations to Cascade. Id. at ¶ 5. As a result of its investigation, the OIC
20 "determined that the relationship between G&W, the ostensible acquiring party, and
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22 ² In May 2004, Mr. Huff pled guilty to three counts of mail fraud in the United
23 States District Court for the Western District of Kentucky. Plaintiff's Response,
24 Appendix A. It is a federal crime for anyone convicted of a felony involving dishonesty
25 or a breach of trust to engage in or participate in the business of insurance. 18 U.S.C.
§ 1033(e).

1 [Midwest] as the ‘lender’ with full control, put [Midwest] in a control or management
2 role by requiring prior approval before G&W could utilize the funds.” Id. at ¶ 6. By
3 attempting to gain an ownership interest in Cascade and exercising some control over it,³
4 Midwest further interjected itself into the forum and subjected itself to Washington’s
5 insurance regulations. Furthermore, Midwest has not shown that it would be burdensome
6 to defend itself in this forum or that exercising jurisdiction over it would conflict with the
7 sovereignty of its home state of Kentucky. Kentucky provides an alternate forum, but it
8 is not a superior forum. Although Midwest and the Huffs are in Kentucky, plaintiff and
9 Cascade are in Washington, ASRC is a California company incorporated in Delaware,
10 and the Pixlers reside in Florida.

11 Defendants also argued, for the first time during the oral argument regarding this
12 motion, that Certified’s bankruptcy proceedings in the Southern District of Florida
13 provide a superior forum. The Court ordered defendants to file a supplemental
14 memorandum addressing that issue, and they have done so. The bankruptcy proceedings
15 involve Cura, now known as Certified HR Services, Co., and defendant Certified. The
16 trustee filed an adversary proceeding against Midwest asserting, among other things, that
17 it improperly diverted funds from Certified HR Services, Co. The trustee also filed a
18 second adversary proceeding against Certified, ASRC, and other entities to consolidate
19 Certified with the bankruptcy proceeding involving Certified HR Services, Co. On
20 February 24, 2006, a settlement agreement was entered into between the trustee and
21 Midwest, Huff, Pixler, Certified, and others. As part of the settlement, Certified was
22 substantively consolidated with its subsidiary Certified HR Services in the bankruptcy
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24 ³ Plaintiff may not be able to prove these facts at trial. However, the evidence
25 offered in opposition to the motion is sufficient to defeat the motion to dismiss.

1 proceedings. The agreement and subsequent order contained, among other things, (1) a
2 release of the trustee's claims against defendants, (2) an acknowledgment that Certified
3 paid funds to Midwest, and (3) a statement that the agreement has no res judicata or
4 collateral estoppel effect on this litigation. Defendants argue that the bankruptcy court is
5 a better forum, in part because it is fully aware of the issues involved. While that may be
6 true, this Court has now spent a significant amount of time considering the issues.
7 Moreover, the adversary proceeding appears to have resolved only the *trustee's* claims
8 against some of the defendants in this case. It is unclear how defendants believe Cascade
9 and plaintiff, who were not parties to the adversary proceeding, could have litigated their
10 claims against all the defendants named in this case. Also, this case involves additional
11 claims, issues, and parties not involved in the bankruptcy proceeding. Although this
12 action is now stayed as to Certified, plaintiff may pursue the claims against the other
13 defendants.

14 Defendants also argue that the bankruptcy court now controls some of the funds
15 that Certified paid to Midwest for Cascade's benefit, which could affect plaintiff's
16 constructive trust claim in this case. Notably, however, by its own terms, the adversary
17 proceeding order does not have res judicata or collateral estoppel effect in this
18 proceeding. Even if some of the funds are under the control of the bankruptcy court,
19 plaintiff is free to pursue all available remedies against the defendants.

20 Furthermore, Washington has a strong interest in providing a forum for this
21 litigation based on the involvement of its Insurance Commissioner and the alleged fraud
22 perpetrated on a domestic company. Moreover, efficiency and economy would be
23 furthered by exercising jurisdiction over the defendants rather than requiring the OIC to
24 litigate its claims against them in multiple forums.

1 Accordingly, the Court finds that the exercise of personal jurisdiction over
2 Midwest is reasonable and comports with due process.

3 **3. Anthony Huff.**

4 Mr. Huff argues that many of his alleged contacts with Washington were the result
5 of Washington residents contacting him. As defendants note, courts do not consider the
6 “unilateral” contacts of third parties in evaluating personal jurisdiction. See, e.g., Silver
7 Valley Partners, LLC v. De Motte, 400 F. Supp. 2d 1262, 1265-66 (W.D. Wash. 2005).
8 Instead, the Court considers Mr. Huff’s own contacts with the forum state, including the
9 conversations that he initiated with a Cascade employee regarding Cascade’s financial
10 condition. Declaration of Lai Morrell, (Dkt. #37) (“Morrell Decl.”) at ¶ 9 (explaining
11 that Mr. Huff called her to obtain a better understanding of how Cascade’s reserves were
12 calculated after Cascade received information showing that its reserves were deficient;
13 stating that she had two subsequent telephone calls with him about the issue). In
14 addition, Mr. Huff at times directed Mr. Pixler’s negotiations with Cascade. Declaration
15 of John Ference, (Dkt. #38) (“Ference Decl.”) at ¶ 4 (explaining, as Vice President of
16 Cascade, that he observed Mr. Pixler answering calls from Mr. Huff during negotiations
17 with Cascade; Mr. Huff appeared to be “providing direction and instruction to Mr. Pixler
18 with regard to the negotiations on the workers comp insurance coverage contract”);
19 Declaration of Harold Anderson, (Dkt. #36) (“Anderson Decl.”) at ¶ 8.

20 The Court also considers, as set forth above, the evidence that Mr. Huff was
21 attempting to gain control over Cascade. Tompkins Decl. at ¶ 9 (explaining that the OIC
22 required Mr. Huff, among others, to complete Form A materials based on the OIC’s
23 concern that they were seeking to gain control over Cascade). Mr. Huff represented that
24 he had control over Midwest, which was a partial owner of Cascade. LaForgia Dep. at
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1 pp. 26-27 (CPA auditing Midwest and Certified testified that, based on his observations,
2 Mr. Huff was “significantly involved in [Midwest’s] day-to-day activities”); id. at p. 24
3 (explaining that Mr. Huff represented to him that he was an owner of Midwest through
4 his wife); Huff Dep. at p. 87 (referring to Midwest as “my company”); R. Pixler Dep. at
5 p. 39 (explaining that she executed a document naming Danny Pixler and Anthony Huff
6 the managers of Midwest). Mr. Huff also created obligations to Washington residents by
7 representing to Mr. Anderson of Legend Holdings that Midwest would provide funding to
8 Cascade. Anderson Decl. at ¶ 15 (Mr. Huff informed Mr. Anderson that “he would
9 withhold additional funding by [Midwest] of Cascade’s loss reserves pending the
10 outcome of a revised actuarial study”); id. at ¶ 11 (explaining that Mr. Huff “summoned”
11 him to Kentucky in July 2004 to discuss “the financial backing for the payments due
12 Cascade from ASRC and Mainstay under the policies issued by Cascade and the ongoing
13 obligations of the purchaser under the [Agreement]”); id. at ¶ 16 (Mr. Huff gave Mr.
14 Anderson assurances that Midwest and Certified would fund bank payments and reserve
15 requirements for Cascade). For purposes of this motion, these contacts are sufficient to
16 show that Mr. Huff, both directly and through Midwest, transacted business with
17 Washington residents and created continuing obligations to them.

18 Plaintiff’s claims also arise out of Mr. Huff’s forum-related activities. They arise
19 out of Mr. Pixler’s and Mr. Huff’s alleged misrepresentations regarding the agreements
20 and funding commitments to Cascade. Plaintiff also alleges that the defendants have
21 retained payments which should have been remitted to Cascade pursuant to the
22 agreements.

23 The Court also considers the reasonableness of exercising personal jurisdiction
24 over Mr. Huff. Many of the same factors that weigh in favor of a finding of
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1 reasonableness regarding Midwest compel the same finding regarding the other moving
2 defendants. Furthermore, according to plaintiff's allegations, Mr. Huff had fairly
3 extensive contacts with Washington residents. Mr. Huff has not shown that it would be
4 burdensome to defend himself in this forum, that exercising jurisdiction over him would
5 conflict with the sovereignty of his home state of Kentucky, or that Kentucky would
6 provide a superior forum. As set forth above, Washington has a strong interest in
7 providing a forum for this litigation. Efficiency and economy would be furthered by
8 exercising jurisdiction over Mr. Huff rather than requiring the OIC to litigate its claims
9 against defendants in multiple forums.

10 Accordingly, the Court finds that the exercise of personal jurisdiction over Mr.
11 Huff is reasonable and comports with due process.

12 **4. Sheri Huff and Roxann Pixler.**

13 Plaintiff alleges that Ms. Huff and Ms. Pixler, who had ownership interests in
14 Midwest, "permitted, authorized, and/or acquiesced" in Midwest's transactions.
15 However, their deposition testimony highlights that they were not directly involved in the
16 Cascade transactions or in Midwest's operations. S. Huff Dep. at p. 103 (explaining that
17 she had no involvement in Midwest's business affairs). Plaintiff also argues that Ms.
18 Pixler and Ms. Huff facilitated the wrongful actions of the other defendants by allowing
19 themselves to be named as the owners of Midwest. Although the Ninth Circuit has not
20 ruled on the "conspiracy theory" of personal jurisdiction, the Court agrees with the logic
21 in Silver Valley Partners, LLC, which rejected the theory. 400 F. Supp.2d at 1268.

22 Plaintiff also alleges that individuals cannot be shielded by the corporate form for
23 purposes of establishing personal jurisdiction. Plaintiff's Opposition at p. 14 n.18 (citing
24 Davis v. Metro Prods., Inc., 885 F.2d 515, 520-21 (9th Cir. 1989) (discussing generally

1 the fiduciary shield doctrine). Even if the corporate form is disregarded, the Court must
2 analyze Ms. Huff's and Ms. Pixler's contacts with this forum. Davis, 885 F.2d at 521.
3 Ms. Huff and Ms. Pixler had no direct contact with this forum. However, plaintiff has
4 also alleged that the other defendants were acting as agents for Ms. Huff and Ms. Pixler.
5 RCW 4.28.185(1)(a) (extending jurisdiction to defendants who transact business in state
6 "in person or through an agent"). For purposes of personal jurisdiction, the actions of an
7 agent are attributable to the principal. See, e.g., Sher v. Johnson, 911 F.2d 1357, 1362
8 (9th Cir. 1990). Plaintiff has not offered any evidence to show that any of the other
9 defendants acted as an agent of Ms. Pixler. Instead, the evidence shows that Ms. Pixler
10 executed a document appointing Mr. Pixler as a manager of Midwest. R. Pixler Dep. at
11 pp. 44, 77. Therefore, while he may have been acting as an agent of Midwest, there is no
12 evidence that he was acting as Ms. Pixler's agent. Accordingly, the Court lacks personal
13 jurisdiction over Ms. Pixler.

14 In contrast, Ms. Huff gave Mr. Huff her power of attorney and authorization to
15 sign documents on her behalf. S. Huff Dep. at p. 130. Plaintiff also alleges that Mr. Huff
16 was acting on Ms. Huff's behalf during his contacts with this forum, and she accepted the
17 profits from those contacts. Although the issue is a close call, the evidence and
18 allegations are sufficient to show, for purposes of this motion, that Ms. Huff conducted
19 business in Washington through Mr. Huff. Furthermore, plaintiff's claims arise out of
20 those contacts with the forum. As set forth above, exercising jurisdiction over Mr. Huff
21 is reasonable, and the same factors show that exercising jurisdiction over Ms. Huff is
22 reasonable. Even though Ms. Huff did not have direct contacts with the forum, she
23 cannot instruct another to act on her behalf, accept the financial benefits of his actions,
24 then disclaim any knowledge of the relevant actions. Accordingly, defendants' motion to
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1 dismiss Ms. Huff for lack of personal jurisdiction is denied.

2 **C. Motion to Dismiss for Failure to State a Claim.**

3 A court should not grant a 12(b)(6) motion for failure to state a claim upon which
 4 relief can be granted unless “it appears beyond a doubt that the Plaintiff can prove no set
 5 of facts which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 47 (1957)
 6 (explaining that the complaint must give the defendant “fair notice of what the plaintiff’s
 7 claim is and the grounds upon which it rests”). The complaint should be liberally
 8 construed in favor of the plaintiff and its factual allegations taken as true. See, e.g.,
 9 Oscar v. Univ. Students Coop. Ass’n, 965 F.2d 783, 785 (9th Cir. 1992). The Court is
 10 “required to read the complaint charitably, to take all well-pleaded facts as true, and to
 11 assume that all general allegations embrace whatever specific facts might be necessary to
 12 support them.” Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994)
 13 (internal citations omitted). Plaintiff is therefore entitled to the benefit of all reasonable
 14 inferences that can be drawn from his allegations.

15 **1. Negligent Misrepresentation Claim Against Anthony Huff.**

16 Washington has adopted the Restatement (Second) of Torts, which sets forth the
 17 elements of a negligent misrepresentation claim:

18 (1) One who, in the course of his business, profession or employment . . . supplies
 19 false information for the guidance of others in their business transactions, is
 20 subject to liability for pecuniary loss caused to them by their justifiable reliance
 upon the information, if he fails to exercise reasonable care or competence in
 obtaining or communicating the information.

21 See Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 180 (1994). Defendants argue that
 22 plaintiff has failed to set forth any facts supporting the negligent representation claim.
 23 The Complaint, however, alleges that Mr. Huff “was directly engaged in negotiations and
 24 communications with [Cascade] relating to many aspects of the workers compensation
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coverage contract, administration and reinsurance.” Complaint at ¶ 1.5. Although defendants argue that the allegations are untrue, the Court must assume their truth for purposes of this motion. The Complaint further alleges that Mr. Huff’s negligent misrepresentations included “(a) misrepresentations as to the financial responsibility of [Certified], (b) the status of claims or causes of action against [Certified] and/or Danny Pixler, (c) the nature and identity of the entity(ies) liable under the Workers Comp Contract with [Cascade], and (d) the status, relationship, and pecuniary interests of the various corporations, persons and entities involved” *Id.* at ¶ 5.3. Plaintiff also alleges that the misrepresentations were material, Cascade justifiably relied on them, and it was harmed. Those allegations are sufficient to state a claim for negligent misrepresentation.

2. Fraud Claim Against Anthony Huff.

Defendants argue that plaintiff’s fraud claim against Mr. Huff should be dismissed because the allegations do not meet the requirements of Rule 9(b), which requires that in “all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” A plaintiff pleading fraud “must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false.” Yourish v. California Amplifier, 191 F.3d 983, 993 (9th Cir. 1999). The complaint must allege the “time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation.” Miscellaneous Serv. Workers, etc. v. Philco-Ford Corp. WDL Div., 661 F.2d 776, 782 (9th Cir. 1981).⁴ Although the complaint generally sets forth

⁴ The Court applies the pleading standard in the Federal Rules of Civil Procedure and Ninth Circuit law, rather than Washington law, to analyze the sufficiency of

1 several misrepresentations made by Mr. Huff, it does not specifically identify any
2 statements, the recipient of the statements, the time, place, and specific content of the
3 representations, or explain why the statements were false. Accordingly, the complaint
4 fails to plead the fraud claim with the requisite particularity, and the Court dismisses the
5 fraud claim without prejudice.

6 During oral argument, plaintiff requested that if the Court dismissed any of the
7 claims for failure to meet the pleading requirements, that it grant leave to amend. The
8 Court grants plaintiff's request and grants it leave to file an amended complaint.

9 **3. Breach of Fiduciary Duty Claim Against Anthony Huff.**

10 In his memoranda, Mr. Huff does not dispute that he had a fiduciary duty to
11 Cascade. Instead, he alleges that the complaint fails to allege how he breached that duty.
12 The complaint's section on this claim states generally that Mr. Huff breached his
13 fiduciary duty and harmed Cascade. In addition, other portions of the complaint allege
14 that Mr. Huff misrepresented facts to Cascade and retained for himself payments due to
15 Cascade. Those allegations are sufficient to state a cause of action for breach of fiduciary
16 duty.

17 **4. Constructive Trust and Unjust Enrichment Claims Against the Moving**
18 **Defendants.**

19 "Unjust enrichment occurs when one retains money or benefits which in justice
20 and equity belong to another." Bailie Comm., Ltd. v. Trend Bus. Sys., Inc., 61 Wn. App.
21 151, 159 (1991). Defendants argue that the complaint is devoid of facts to support
22 plaintiff's claims for unjust enrichment and the equitable remedy of a constructive trust.
23 However, the complaint alleges that the defendants "took possession of monies which had

24 _____
25 plaintiff's fraud allegations.

1 been paid by clients of ASRC and/or [Certified] as and for premiums for workers
2 compensation insurance coverage provided by [Cascade]. Said defendant(s) received,
3 and have held and hold such monies in trust or constructive trust for and on behalf of
4 [Cascade].” Complaint at ¶ 7.2. Because plaintiff alleges that Mr. Huff was acting as
5 Ms. Huff’s agent, the allegations against him are also allegations against her. Although
6 the facts alleged against Midwest and Mr. Huff are relatively scant, they are sufficient to
7 satisfy the notice pleading requirement.

8 **5. Civil Conspiracy Claim Against the Moving Defendants.**

9 A civil conspiracy “exists if two or more persons combine to accomplish an
10 unlawful purpose or combine to accomplish some purpose not in itself unlawful by
11 unlawful means.” Corbit v. J.I. Case Co., 70 Wn.2d 522, 528 (1967). Defendants argue
12 that the civil conspiracy claim sounds in fraud and must be pled with particularity under
13 Rule 9(b). The Ninth Circuit has held that claims that are “grounded in fraud” or that
14 “sound in fraud” must satisfy the particularity requirement of Rule 9(b). Vess v. Ciba-
15 Geigy Corp., 317 F.3d 1097, 1103-04 (9th Cir. 2003). In Washington, a civil conspiracy
16 must be established by clear, cogent, and convincing evidence, like a fraud claim. Corbit,
17 70 Wn.2d at 528. Moreover, the Ninth Circuit has held that “if the object of the
18 conspiracy is fraudulent,” a plaintiff must comply with Rule 9(b) and “must plead, at a
19 minimum, the basic elements of a civil conspiracy.” Wasco Prods., Inc. v. Southwall
20 Techs., Inc., 435 F.3d 989, 990-91 (9th Cir. 2006) (applying Rule 9(b) because the object
21 of the conspiracy was the manufacturer’s misrepresentation of its product to the plaintiff
22 purchasers). In this case, the gravamen of the conspiracy allegation is that the defendants
23 engaged in a scheme to take ownership of Cascade, induce it into providing insurance
24 coverage, use Cascade and its coverage to obtain premium payments from third parties,

1 and defraud it out of the premium payments that it was owed. The conspiracy involved a
 2 series of misrepresentations about the entities and individuals involved, their
 3 relationships, and their financial commitments. The conspiracy allegation therefore
 4 sounds in fraud.

5 As with the fraud claim, however, the allegation is not pled with the requisite
 6 particularity. Instead, the complaint contains only general allegations that mirror the
 7 elements of the claim. Complaint at ¶ 10.2 (“Two or more of the defendants . . . have
 8 combined to engage in conduct for and/or in furtherance of an unlawful purpose and/or
 9 through unlawful means, and have entered into an express or implied agreement to
 10 accomplish the common design or conspiracy”). Plaintiff has not identified with
 11 particularity the who, what, where, when, why, and how of the supposed agreement to
 12 defraud Cascade. Accordingly, the civil conspiracy claim cannot stand as currently
 13 alleged, and it is dismissed without prejudice.

14 **6. Criminal Profiteering Act Claim Against the Moving Defendants.**

15 Plaintiff alleges that defendants violated RCW 9A.82.060, which provides as
 16 follows:

- 17 (1) A person commits the offense of leading organized crime by:
 18 (a) Intentionally organizing, managing, directing, supervising, or financing
 19 any three or more persons with the intent to engage in a pattern of criminal
 20 profiteering activity; or
 21 (b) Intentionally inciting or inducing others to engage in violence or
 22 intimidation with the intent to further or promote the accomplishment of a pattern
 23 of criminal profiteering activity.⁵

21 RCW 9A.82.010(4) defines “criminal profiteering” as

22 any act, including any anticipatory or completed offense, committed for financial
 23 gain, that is chargeable or indictable under the laws of the state in which the act

24 ⁵ The Court assumes, as the parties did, that a Criminal Profiteering Act claim can
 25 be alleged against a corporate entity like Midwest.

1 occurred and, if the act occurred in a state other than this state, would be
2 chargeable or indictable under the laws of this state had the act occurred in this
3 state and punishable as a felony and by imprisonment for more than one year,
4 regardless of whether the act is charged or indicted.

5 “Pattern of criminal profiteering activity” is defined as “engaging in at least three acts of
6 criminal profiteering, one of which occurred after July 1, 1985, and the last of which
7 occurred within five years, excluding any period of imprisonment, after the commission
8 of the earliest act of criminal profiteering.” RCW 9A.82.010(12). Plaintiff notes that the
9 statute specifically includes theft as an example. RCW 9A.82.010(4)(e).

10 Defendants allege that the criminal profiteering claim sounds in fraud. As with the
11 civil conspiracy claim, it appears that the crux of the claim is that the defendants engaged
12 in a scheme to defraud Cascade out of the premium payments that it was owed. Plaintiff
13 alleges that the conduct subject to the Criminal Profiteering Act also included deceiving
14 regulators, obtaining from third parties large sums that were intended to pay Cascade’s
15 premiums, wrongfully retaining the premium payments, “deliberately concealing Mr.
16 Huff’s interest and participation” with Cascade because he was ineligible for involvement
17 in the insurance industry, and “setting up sham entities without adequate capitalization to
18 mislead Cascade and avoid detection of true ownership interests.” Plaintiff’s Opposition
19 at pp. 33-34. Those allegations necessarily describe fraudulent conduct and are subject to
20 the heightened pleading standard of Rule 9(b). The Complaint, however, contains no
21 specific allegations to meet that standard. Accordingly, the Criminal Profiteering Act
22 claim must be dismissed without prejudice.

23 **7. Consumer Protection Act Claim Against the Moving Defendants.**

24 As an initial matter, defendants allege that the CPA claim sounds in fraud and is
25 therefore subject to the pleading requirements of Rule 9(b). Defendants, however, cite no
26 authority holding that a CPA claim sounds in or is grounded in fraud. Furthermore, a

1 comparison of the elements required for a CPA claim and for a fraud claim show that the
 2 CPA claim does not sound in fraud. A CPA claim, unlike a fraud claim, requires a public
 3 interest impact, and does not require proof of intent and knowledge that material
 4 misrepresentations are false or misleading. Rather, it requires proof of an unfair or
 5 deceptive act or practice.⁶ Accordingly, the CPA claim does not sound in fraud. Cf.
 6 Gordon v. Impulse Marketing Group, Inc., 375 F. Supp.2d 1040, 1048 (E.D. Wash. 2005)
 7 (explaining that a claim under Washington's Commercial Electronic Mail Act and related
 8 CPA claim did not sound in fraud because the claims required different elements); see
 9 also Trask v. Butler, 123 Wn.2d 835, 845 (1994) (analyzing sufficiency of the CPA
 10 allegations under Rule 8).

11 A review of the complaint shows that plaintiff has met the traditional pleading
 12 requirements for the CPA claim. Plaintiff alleges that Mr. Huff and Midwest deceived
 13 Cascade's owner into agreeing to sell a portion of Cascade, made misrepresentations,
 14 retained for themselves payments due to Cascade, and thereby injured Cascade. Plaintiff
 15 also alleges that Cascade was harmed as a result. Given the potential public interest
 16 impact of their conduct, the Court cannot find that plaintiff can prove no set of facts that
 17 would entitle it to relief on the CPA claim.

18 III. CONCLUSION

19 For all of the foregoing reasons, the Court GRANTS IN PART AND DENIES IN
 20 PART the moving defendants' motion to dismiss. (Dkt. #21). Plaintiff's claims against
 21

22 ⁶ The elements of a CPA claim are: (1) an unfair or deceptive act or practice, (2)
 23 occurring in trade or commerce, (3) with a public interest impact, (4) an injury to plaintiff
 24 in his or her business or property, and (5) a causal relationship between the unfair or
 25 deceptive act and the resulting injury. See, e.g., Hangman v. Ridge Training Stables, Inc.
v. Safeco Title Ins. Co., 105 Wn. 2d 778, 780, 784 (1986).

1 Roxann Pixler are dismissed for lack of personal jurisdiction. The Court dismisses
2 without prejudice plaintiff's fraud claim against Mr. Huff, the civil conspiracy claim
3 against the moving defendants, and the Criminal Profiteering Act claim against the
4 moving defendants. Plaintiff may file an amended complaint no later than twenty days
5 from the date of this order.

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7 DATED this 7th day of December, 2006.

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10 Robert S. Lasnik
11 United States District Judge
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